

BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA

IN RE: COMPLAINT AND	§	
PETITION FOR RELIEF OF	§	
BELLSOUTH	§	
TELECOMMUNICATIONS, LLC	§	DOCKET NO. 2011-304-C
d/b/a AT&T SOUTHEAST d/b/a	§	
AT&T SOUTH CAROLINA v. HALO	§	
WIRELESS, INCORPORATED FOR	§	
BREACH OF THE PARTIES'	§	
INTERCONNECTION AGREEMENT		

**FIRST NOTICE OF SUPPLEMENTAL AUTHORITY**

Halo Wireless, Inc. ("Halo" or the "Debtor") files this First Notice of Supplemental Authority ("Notice") to advise the Commission of recent orders of the United States Court of Appeals for the Fifth Circuit that may moot further proceedings here and warrant abating any pending action until the Fifth Circuit renders its decision on the expedited schedule it just established.

1. On October 26, 2011, the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division (the "Bankruptcy Court") ruled that twenty state commission proceedings (including this one), all of which were filed by *private parties* seeking relief against *private parties* before the state commissions *as tribunals*, constitute actions "by a governmental unit" and that such actions were "to enforce such governmental unit's police or regulatory power."<sup>1</sup>

2. Halo immediately requested that the Bankruptcy Court stay its ruling pending an appeal. On November 1, 2011, the Bankruptcy Court denied Halo's motions

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<sup>1</sup> True and correct copies of the three orders entered by the Bankruptcy Court on October 26, 2011, are attached hereto as Exhibit "A."

for stay pending appeal,<sup>2</sup> but at the same time certified the appeal to the Fifth Circuit on the specific ground that there is no controlling Fifth Circuit precedent.<sup>3</sup> In the Bankruptcy Court's Order Denying Stay, the court stated on page 3: **"This case involves a serious legal question and, in light of the absence of controlling Fifth Circuit authority, there is a risk that this Court's decision could be reversed"** (Ex. B, emphasis added). Then, on November 7, 2011, the Bankruptcy Court entered its "Certification to the Court of Appeals" pursuant to 28 U.S.C. § 158(d)(2), stating that the October 26, 2011 decision, "involves a question of law as to which there is no controlling decision of the court of appeals for this circuit or of the Supreme Court of the United States." (Ex. C).

3. On February 2, 2012, the United States Court of Appeals for the Fifth Circuit granted Halo's Motion for Leave to Appeal under 28 U.S.C. § 158(d).<sup>4</sup> Recognizing the importance of the issue being appealed to the Debtor's survival, the Fifth Circuit has also expedited the briefing schedule,<sup>5</sup> requiring all briefing to be filed by April 9, 2012<sup>6</sup> and setting oral argument for the week of April 30, 2012.<sup>7</sup>

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<sup>2</sup> A copy of the Order Denying Motions For Stay Pending Appeal is attached hereto as Exhibit "B" (the **"Order Denying Stay"**).

<sup>3</sup> The Bankruptcy Court made this ruling from the bench. A written certification was made on November 7, 2011, a copy of which is attached hereto as Exhibit "C."

<sup>4</sup> A true and correct copy of the Fifth Circuit's Order granting Halo's motion for leave to appeal is attached hereto as Exhibit "D."

<sup>5</sup> A true and correct copy of the Fifth Circuit's Order granting Halo's motion to expedite the briefing schedule is attached hereto as Exhibit "E."

<sup>6</sup> A true and correct copy of the correspondence dated February 14, 2012 from Peter A. Connors, Deputy Clerk at the Fifth Circuit, setting forth the expedited briefing schedule, is attached hereto as Exhibit "F."

<sup>7</sup> A true and correct copy of the correspondence dated February 8, 2012 from Peter A. Connors, Deputy Clerk at the Fifth Circuit, notifying counsel that the case had been placed on the oral argument calendar for the week of April 30, 2012, is attached hereto as Exhibit "G."

4. With briefing in progress and oral argument imminent, Halo files this Notice to bring the status of the appeal to the Commission's attention so that the Commission may be aware of the expedited nature of the appeal as it makes decisions in the above-referenced proceeding. If the Fifth Circuit finds, consistent with all extant precedent, that the state commission proceedings are subject to the automatic stay, any actions taken by the state commissions would be void *ab initio*.

5. As the Commission knows from previous filings, Halo asserts that the Bankruptcy Court's decision contravenes the plain text of the statute and all prior judicial understanding of it. Halo believes the Fifth Circuit will reverse the legally erroneous decision. Not one case cited by the complaining parties, and not one case cited by the Bankruptcy Court to support its ruling, involved a situation where private parties sued private parties before a state commission. The Bankruptcy Court's ruling effectively removes the requirement that any suit must be brought by a governmental unit in order to be excepted from the automatic stay. 11 USC §§ 362(a)(1) & (b)(4). The Bankruptcy Court thereby dramatically expanded the "governmental unit" exception to the automatic stay found in 11 U.S.C. § 362(b)(4), contravening the plain language of the Bankruptcy Code, express Congressional intent, and the entirety of relevant case law.

6. Regardless of whether the Commission agrees with Halo's position, the risk of reversal is real, as previously admitted by the Bankruptcy Court (see paragraph 2, *supra*). Accordingly, in view of the acknowledged precarious and tenuous ruling of the Bankruptcy Court, and the Fifth Circuit's decision to expedite Halo's appeal to the first available oral argument setting, Halo requests that the Commission abate any deadlines or proceedings until the conclusion of the appellate process in the Fifth Circuit.

Respectfully submitted this 27th day of February, 2012.

Respectfully submitted,

s/ John J. Pringle, Jr.

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing *First Notice of Supplemental Authority* was served via electronic and first class mail on the following counsel of record on this the 27<sup>th</sup> day of February, 2012:

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